

Journal of Law & Commerce

Vol. 33, No. 2 (2015) • ISSN: 2164-7984 (online)

DOI 10.5195/jlc.2015.82 • <http://jlc.law.pitt.edu>

THE INFLUENCE OF CORRUPTION ON THE DEVELOPING WORLD: THE FOREIGN CORRUPT PRACTICES ACT, INTERNATIONAL COMMERCE AND AFRICA

Nellie R. Dunderdale



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

THE INFLUENCE OF CORRUPTION ON THE DEVELOPING WORLD: THE FOREIGN CORRUPT PRACTICES ACT, INTERNATIONAL COMMERCE AND AFRICA

*Nellie R. Dunderdale**

I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA or the Act) was enacted in 1977 in reaction to the highly publicized incidences of bribery in the United States in the 1970s.¹ Enforcement of the FCPA has grown over the last ten years and the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have cracked down on violators of the Act. This increased focus on anticorruption in the United States has been met with increased anticorruption efforts by organizations throughout the world including the United Nations, the World Bank and the Organization for Economic Co-operation and Development (OECD). The FCPA demonstrates the United States' commitment to fight against bribery and corruption and the Act has had a substantial impact on commerce between organizations in the United States and the developing world.

II. THE HISTORY AND IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT ON INTERNATIONAL COMMERCE

Corruption has a corrosive impact on democratic institutions and siphons money away from important public services in healthcare,

* Nellie R. Dunderdale is a Law Student at the University of Pittsburgh, J.D. Candidate 2015.

¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified and amended at 15 U.S.C. §§ 78dd-1, *et seq.* (2000)), amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd-1, *et seq.* (2000)), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1, *et seq.* (2000)).

education, governance and national infrastructure.² In the Senate Report for the FCPA in 1977, the U.S. Senate stated,

Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.³

The enforcement of the FCPA continues to be a focus of the DOJ and SEC because of the detrimental effects of bribery.⁴ Though bribes might seem like a simple solution to an immediate problem, this is a shortsighted view, as these acts of bribery slow development in the host countries, hinder future business ventures with these countries and complicate American foreign policy.⁵

A. History of the FCPA

President Jimmy Carter signed the Foreign Corrupt Practices Act of 1977 in an attempt to restore confidence in the United States' business practices after many American companies admitted to bribery and other illegal payments to political actors in foreign countries in the 1970s.⁶ Leading up to the enactment of the FCPA the U.S. Securities and Exchange Commission discovered more than 400 U.S. companies that had paid hundreds of millions of dollars in bribes to foreign government officials in order to secure business overseas.⁷

² *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, CRIM. DIVISION OF THE U.S. DEPT OF JUST. AND THE ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCH. COMM'N 1, 2–3 (Nov. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [hereinafter *FCPA Resource Guide*].

³ S. REP. NO. 95-114, at 4 (1977).

⁴ *FCPA Resource Guide*, *supra* note 2, at 2.

⁵ *Id.* at 3.

⁶ David M. Zornow et al., *The United States Foreign Corrupt Practices Act: SEC and DOJ Enforcement Trends* (Apr. 22, 2013), http://www.law.yale.edu/documents/pdf/cbl/Skadden_FCPA_SEC_and_DOJ_Enforcement_Trends.pdf.

⁷ *FCPA Resource Guide*, *supra* note 2, at 3.

The FCPA was enacted to prevent and make it unlawful for certain persons and entities to make payments to foreign officers in an attempt to obtain or retain business.⁸ Under the FCPA,

It shall be unlawful for any issuer . . . or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—(1) any foreign official for purposes of—(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.⁹

The FCPA is two-fold, (1) the anti-bribery provisions (the focus of this note) and (2) the accounting provisions.¹⁰ The accounting provisions require issuers to keep accurate books and records to provide reasonable assurances that their transactions have been executed and assets have been accounted for in accordance with the FCPA.¹¹ Violations of the anti-bribery provisions of the FCPA occur when a corporation or any of its agents, pays, offers or promises to pay or provide anything of value to a foreign official in a corrupt effort to retain business.¹² The FCPA addresses “domestic concerns.” U.S. companies or nationals therefore are under the FCPA but parties subject to the FCPA are expanded through the use of the term “issuers.”¹³

The FCPA was amended in 1998 to extend the anti-bribery provisions to foreign firms and persons who directly or through agents, act to further a corrupt payment that takes place within the territory of the United States.¹⁴

⁸ UNITED STATES DEPARTMENT OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Mar. 8, 2015) [hereinafter DOJ: FCPA].

⁹ 15 U.S.C. § 78dd-1(a) (1977).

¹⁰ Zornow et al., *supra* note 6.

¹¹ UNITED STATES SECURITIES AND EXCHANGE COMMISSION, SPOTLIGHT ON FOREIGN CORRUPT PRACTICES ACT, <http://www.sec.gov/spotlight/fcpa.shtml> (last visited Mar. 8, 2015) [hereinafter SEC: FCPA SPOTLIGHT].

¹² 15 U.S.C. § 78dd-1.

¹³ *Id.* § 78dd-2.

¹⁴ *Id.* § 78dd-1.

Congress amended the FCPA to add two affirmative defenses: (1) the local law defense; and (2) the reasonable and bona fide promotional expense defense.¹⁵ Congress also requested that the President negotiate an international treaty with the Organization for Economic Co-operation and Development (OECD) to prohibit bribery in international business transactions.¹⁶ These negotiations at the OECD brought about the Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention), which required parties to criminalize the bribing of foreign officials.¹⁷

As of November 1, 2012, there were 39 parties to the Anti-Bribery Convention: 34 OECD member countries (including the United States) and five non-OECD member countries (Argentina, Brazil, Bulgaria, the Russian Federation, and South Africa).¹⁸ All parties are also members of the OECD Working Group on Bribery.¹⁹ Demonstrating the international community's continued dedication to anticorruption measures, the United Nations Convention Against Corruption (UNCAC) was adopted by the U.N. General Assembly on October 31, 2003, and entered into force on December 14, 2005.²⁰ The United States is a state party to the UNCAC.²¹

In 1998, the FCPA was amended again to conform to the requirements of the Anti-Bribery Convention.²² The FCPA's scope expanded to include payments made to secure "any improper advantage," and reach foreign persons who commit an act in furtherance of a foreign bribe while in the United States.²³ Public international organizations were now included in the definition of "foreign official," an alternative basis for jurisdiction based on

¹⁵ *FCPA Resource Guide*, *supra* note 2, at 3.

¹⁶ *Id.*

¹⁷ Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* (May 23, 1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

¹⁸ Organisation for Economic Co-operation and Development, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

¹⁹ *Id.*

²⁰ United Nations Convention Against Corruption, *adopted by U.N. General Assembly on Oct. 31, 2003*, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

²¹ *Id.*

²² *FCPA Resource Guide*, *supra* note 2, at 4.

²³ *Id.*

nationality was added, and criminal penalties can now be applied to foreign nationals employed by or acting as agents of U.S. companies.²⁴

The amended FCPA is far reaching with the inclusion of violations by foreign firms within U.S. territories and a broad definition of foreign officials.²⁵ Under the Act the term “foreign official” includes,

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.²⁶

B. Enforcement of the FCPA Since 1977

There has been a push over the last ten years to increase enforcement of the FCPA and this can be seen through the increase in cases and fines leveled against organizations violating the statute. The FCPA is enforced through the DOJ and the SEC.²⁷ They share enforcement authority for the FCPA’s anti-bribery and accounting provisions and also work with many other federal agencies and law enforcement partners to “investigate and prosecute FCPA violations, reduce bribery demands through good governance programs and other measures, and promote a fair playing field for U.S. companies doing business abroad.”²⁸ Though the SEC and DOJ take the lead on FCPA enforcement, there are many other areas of the government, namely the Department of Commerce, Federal Bureau of Investigation, Department of Treasury and State Department, which fight corruption through other means.²⁹ The State Department’s recent focus and

²⁴ *Id.*

²⁵ 15 U.S.C. § 78dd-1(f)(1)(A) (1977).

²⁶ *Id.*

²⁷ See DOJ: FCPA, *supra* note 8; SEC: FCPA SPOTLIGHT, *supra* note 11.

²⁸ *FCPA Resource Guide*, *supra* note 2, at 4.

²⁹ See UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL ANTICORRUPTION AND GOOD GOVERNANCE ACT, <http://www.state.gov/j/inl/rls/rpt/c6696.htm> (last visited Mar. 8, 2015); UNITED STATES DEPARTMENT OF COMMERCE, TRANSPARENCY AND ANTI-BRIBERY INITIATIVES, <http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives> (last visited Mar. 8, 2015).

promotion of good governance programs throughout the world is a specific example of this.³⁰

The DOJ has criminal and civil enforcement responsibility for the FCPA's anti-bribery provisions over "domestic concerns."³¹ The enforcement occurs predominantly through the Fraud Section of the Criminal Division, which works closely with U.S. Attorneys' offices throughout the nation.³² The SEC is responsible for civil enforcement of the FCPA and there is a specialized FCPA unit within the enforcement division of the SEC.³³ Both of these organizations have tried to be more transparent in what constitutes a violation, who can have charges brought against them, and procedures to follow regarding the FCPA.³⁴

There has been much confusion over what constitutes a violation and this uncertainty can cause stress and hinder international business endeavors and foreign economic growth due to over cautiousness.³⁵ To avoid some of this confusion and fear, the Department of Justice created a 100+ page resource guide to the FCPA that attempts to provide businesses and individuals with details on the history and implementation of the Act.³⁶ This document was in response to criticism by organizations such as the U.S. Chamber of Commerce that led a campaign against the FCPA because of confusion over what constituted a bribe, definitions within the Act, and what kind of cases the DOJ and SEC planned to pursue.³⁷

One area of confusion was over the meaning of the term "foreign officials" under the Act.³⁸ As stated earlier, the Act defines "foreign officials" as "any officer or employee of a foreign government or any

³⁰ USAID, PROMOTING ACCOUNTABILITY & TRANSPARENCY, available at <http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency> (last visited Jan. 25, 2014).

³¹ DOJ: FCPA, *supra* note 8.

³² *Id.*

³³ SEC: FCPA SPOTLIGHT, *supra* note 11.

³⁴ See DOJ: FCPA, *supra* note 8; SEC: FCPA SPOTLIGHT, *supra* note 11.

³⁵ Joe Palazzolo, *Is It a Bribe . . . or Not? Do you know what violates the Foreign Corrupt Practices Act? Take our quiz and find out*, WALL ST. J., July 21, 2013, <http://online.wsj.com/article/SB10001424127887324021104578551251640574378.html>.

³⁶ FCPA Resource Guide, *supra* note 2.

³⁷ Dan Froomkin, *Foreign Corrupt Practices Act Guide Issued by Justice Department, Securities Commission*, HUFFINGTON POST, Nov. 14, 2012, http://www.huffingtonpost.com/2012/11/14/foreign-corrupt-practices-act-guide_n_2130097.html.

³⁸ *Id.*

department, agency, or instrumentality thereof . . .” and then continues to offer an expansive list of others that fall within the category.³⁹ The amended FCPA expanded but did not clarify what constitutes a “foreign official,” but the DOJ’s FCPA guide helps to clarify the term.⁴⁰ The guide explains in some detail who qualifies as a “foreign official” and who does not, but adds,

[c]ompanies and individuals should also remember that, whether an entity is an instrumentality of a foreign government or a private entity, commercial (i.e., private-to-private) bribery may still violate the FCPA’s accounting provisions, the Travel Act, anti-money laundering laws, and other federal or foreign laws. Any type of corrupt payment thus carries a risk of prosecution.⁴¹

Violations of the FCPA can lead to criminal and civil penalties for both organizations & individuals. For criminal violations of the anti-bribery provisions, a corporation is subject to a fine of up to \$2 million and individuals are subject to a fine of up to \$100,000 and up to 5 years of imprisonment.⁴² Violations of the accounting provisions are significantly higher.⁴³

The DOJ’s enforcement of violations under the FCPA occurs through Attorney Generals’ offices throughout the United States.⁴⁴ Violations are reported to Attorney generals and the FCPA states that,

[t]he Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the preceding provisions of this section . . . [i]n any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice’s present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence.⁴⁵

³⁹ 15 U.S.C. § 78dd-1(f)(1)(A) (1977).

⁴⁰ *FCPA Resource Guide*, *supra* note 2, at 19–21.

⁴¹ *Id.* at 21.

⁴² 15 U.S.C. § 78dd-2(g)(2)(A) (1977).

⁴³ 15 U.S.C. § 78m (1977).

⁴⁴ *FCPA Resource Guide*, *supra* note 2, at 4.

⁴⁵ 15 U.S.C. § 78dd-1(e)(1) (1977).

When calculating penalties for FCPA violations, the DOJ looks to the U.S. Sentencing Guidelines.⁴⁶ They contribute to the improved and more transparent process behind the enforcement of the FCPA.⁴⁷ The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine an appropriate penalty, the level of the offense is determined by examining the severity of the crime and also the facts specific to that crime.⁴⁸ Penalty reductions can be made with demonstrated cooperation and acceptance of responsibility, and “additional factors such as voluntary disclosure, cooperation, pre-existing compliance programs, and remediation” are also considered when determining penalty reductions for business entities.⁴⁹

Though the SEC and DOJ can dole out civil and criminal (DOJ only) penalties, individuals and businesses that violate the FCPA are also subject to additional repercussions like suspension of privileges or debarment from contracting with the federal government.⁵⁰

C. Increased and Intensified Enforcement of the FCPA Since the 1990s

The SEC and DOJ have increased and intensified their FCPA enforcement efforts. Businesses now have a clearer understanding of enforcement through the DOJ’s guide and in recent years the U.S. government has continued to demonstrate that when it comes to bribery, they are not messing around.⁵¹ There were 25 enforcement actions taken in 2012 and 48 in 2011 and between the DOJ and SEC there are at any given time over 100 ongoing FCPA investigations.

⁴⁶ *Id.* at 68. The U.S. Sentencing Guidelines are promulgated by the U.S. Sentencing Commission. The U.S. Sentencing Commission is an independent agency in the judicial branch. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. The Guidelines and policy statements put forth by the Commission are issued pursuant to Section 994(a) of Title 28, UNITED STATES CODE. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2011).

⁴⁷ *FCPA Resource Guide*, *supra* note 2, at 68.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 48 C.F.R. §§ 9.406-2, 9.407-2; 48 C.F.R. § 9.402(b).

⁵¹ Peter J. Henning, *Dealing With the Foreign Corrupt Practices Act*, N.Y. TIMES, Mar. 4, 2013, http://dealbook.nytimes.com/2013/03/04/dealing-with-the-foreign-corrupt-practices-act/?_r=0.

The penalties for discovered corruption are severe and getting harsher. In 2012, the government collected over \$260 million for FCPA violations and that number increased in 2013 with Weatherford International alone agreeing to pay more than \$250 million to settle with the SEC and other agencies.⁵² In this case, the SEC charged Weatherford International, a Swiss-based oil field services company, with authorizing bribes and improper travel and entertainment for foreign officials in the Middle East and Africa to solicit business.⁵³ The SEC's commitment to enforcement of the FCPA included the creation of a new specialized unit in 2010.⁵⁴ This new organization structure allows for the SEC to sort through a greater number of corruption claims and focus on highly specialized areas of securities law.⁵⁵

D. Impact of Increased Enforcement of the FCPA on International Commerce and U.S. Business

Though there is a concern about the detrimental effect of harsh FCPA crackdowns on the competitiveness of American corporations against other corporations that are not bound by the same rules, the benefits of diminished corruption and bribery throughout the world outweigh the temporary costs to American corporations. In the end, the restrictions under the FCPA, protect corporations from future pit falls. The recent release of the DOJ and SEC's guide to the FCPA contributes to a greater transparency and clarity for organizations hoping to take or continue their business internationally. By clearly stating what constitutes a "Foreign Corrupt Practice," and the penalties that will occur with violations of the Act, corporations are better prepared to participate in business in countries where good governance is limited and where business interactions often become ethically murky.⁵⁶

⁵² See U.S. SEC. & EXCH. COMM'N, SEC ENFORCEMENT ACTIONS: FCPA CASES, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last modified Dec. 22, 2014).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), <http://www.sec.gov/news/press/2010/2010-5.htm>.

⁵⁶ *FCPA Resource Guide*, *supra* note 2, at 3, 68, 90.

E. Alcoa's \$384 Settlement with the SEC for FCPA Violations in January, 2014

Enforcement of the FCPA in 2014 started with a bang. In what is one of the largest anticorruption settlements in United States history, Alcoa and a joint venture that it controls, were charged with bribing officials of a Bahraini state-controlled aluminum smelter.⁵⁷ The SEC's investigation found that over \$110 million in corrupt payments had been made to Bahraini officials with influence over contract negotiations between Alcoa and a major government-operated aluminum plant.⁵⁸ Alcoa subsidiaries used a London-based consultant as an intermediary to negotiate with government officials and to handle the illicit payments needed to retain Alcoa's business as the plant's supplier. "Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa's books and records as legitimate commissions or sales to a distributor."⁵⁹

Alcoa agreed to settle the SEC's civil charges and a parallel criminal case brought by the DOJ.⁶⁰ They agreed to pay a total of \$384 million: \$175 million in disgorgement of ill-gotten gains and a criminal fine of \$209 million.⁶¹ This is the fourth largest combined DOJ and SEC settlement, the largest being an agreement by Siemens of Germany to pay \$800 million in 2008.⁶² George Canellos, co-director of the SEC Enforcement Division, stated in response to the Alcoa incident, "as the beneficiary of a long-running bribery scheme perpetrated by a closely controlled subsidiary, Alcoa is liable and must be held responsible."⁶³

Alcoa's settlement with the SEC has had a noticeable impact on the company.⁶⁴ When the company said that it was in settlement talks with the

⁵⁷ *Alcoa to Pay \$384 Million to Settle Bribery Charges*, N.Y. TIMES, Jan. 9, 2014, http://www.nytimes.com/2014/01/10/business/alcoa-to-pay-384-million-to-settle-bribery-charges.html?_r=0.

⁵⁸ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Alcoa With FCPA Violations (Jan. 9, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.UuvnRT1dVyw./2010/2010-5.htm>.

⁵⁹ *Id.*

⁶⁰ Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 58.

⁶¹ *Id.*

⁶² *Alcoa to Pay \$384 Million to Settle Bribery Charges*, *supra* note 57.

⁶³ *Id.*

⁶⁴ *Id.*

DOJ and SEC, shares of Alcoa fell 1.3 percent to end regular trading at \$10.69 on the New York Exchange.⁶⁵ The highly publicized nature of Alcoa's FCPA violations can only help the DOJ and SEC demonstrate just how serious they are about putting an end to corruption through the enforcement of the FCPA.

III. CORRUPTION AND BRIBERY IN AFRICA

The strict enforcement of the FCPA by the SEC and DOJ has an impact on U.S. companies as they search out new frontiers in business and areas for growth and expansion. Though Africa is a logical choice for expansion with its natural resources and growth potential, the prevalence of corruption in Africa should cause U.S. businesses to pause. Six out of the ten most corrupt nations in the world are located in Sub-Saharan Africa.⁶⁶ A 2002 study by the African Union estimated that corruption claimed roughly \$150 billion a year.⁶⁷ Compare this to the \$22.5 billion in aid that developed countries gave to Sub-Saharan Africa in 2008.⁶⁸ Corruption is considered to be one of the greatest factors contributing to the stunted growth experienced by many African nations.⁶⁹ But with increased transparency and growing foreign investment it is crucial that the United States continue to police corruption through measures like the FCPA.

⁶⁵ *Id.*

⁶⁶ Stephanie Hanson, *Corruption in Sub-Saharan Africa*, COUNCIL ON FOREIGN REL. (Aug. 6, 2009), <http://www.cfr.org/africa-sub-saharan/corruption-sub-saharan-africa/p19984#p6>.

⁶⁷ Elizabeth Blunt, *Corruption 'Costs Africa Billions'*, BBC NEWS (Sept. 18, 2002), <http://news.bbc.co.uk/2/hi/africa/2265387.stm>.

⁶⁸ *Development Aid as its Highest Level Ever in 2008*, OECD (2008), <http://www.oecd.org/development/developmentaidatitshighestleveleverin2008.htm>.

⁶⁹ Hanson, *supra* note 66.

A. The Impact of Corruption and Bribery on Development Efforts Within African Nations and Business with U.S. Corporations Has Been Immense and Detrimental

Corruption and bribery are prevalent in most developing countries including many African nations.⁷⁰ Corruption infiltrates and affects all areas of society but it has an especially crippling effect on development efforts.⁷¹ Eighty percent of Africans live on less than \$2 a day and many of the issues leading to this widespread poverty can be traced back to corruption and bribery of foreign officials. Africa is rapidly developing as democracies develop and mature, infrastructure grows and organizations like the World Bank, International Monetary Fund (IMF) and the African Union (AU) have started to play a larger role in policing the behavior of African Nations.⁷² In 1996, the World Bank revised its guidelines to state explicitly that corruption and fraud would be grounds for cancelling contracts with borrowers and since then, the World Bank, IMF and other donor agencies, have insisted that governments commit to tackling corruption as a condition for aid.⁷³

Though advances have been made, there are still many red flags that should be concerning for U.S. companies.⁷⁴ With the SEC and DOJ cracking down on bribery and FCPA violations, now is not the time for companies to risk participating in acts of corruption. U.S. companies interested in foreign business opportunities cannot afford to stay out of Africa but they must also be careful to comply with the FCPA.⁷⁵ Africa has

⁷⁰ Convention on Preventing and Combating Corruption, July 11, 2003, 2nd Sess., Aft. Union, <http://www.africa-union.org/root/AU/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf> (last visited Jan. 25, 2014).

⁷¹ African Development Bank Group, Integrity and Anti-Corruption Department, Progress Report 2009–2010, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Integrity%20and%20Anti-Corruption.pdf>.

⁷² Muniye M. Mulinge & Gwen N. Lesetedi, *Corruption in Sub-Saharan Africa: Towards a More Holistic Approach*, 7 AFR. J. POL. SCI. 1 (2002), <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/political%20science/volume7n1/ajps007001004.pdf>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Herbert A. Igbanugo, *Emerging Markets of Sub-Saharan Africa & the U.S. Foreign Corrupt Practices Act: A Cautionary Tale*, 3 IGBANUGO PARTNERS INT'L LAW FIRM 1, PLLC (2012), <http://www.igbanugolaw.com/resources/Emerging-Markets-of-SSA-and-The-FCPA-A-Cautionary-Tale.pdf>.

been associated with a large number of FCPA violations therefore, U.S. companies continually have to weigh the possible economic benefits of business in Africa against potential FCPA pitfalls.⁷⁶

B. Efforts to Curb Corruption in Africa

Though many efforts have been made to eradicate corruption in Africa, they have had limited success.⁷⁷ With corruption comes a host of societal problems including voter fraud, extreme poverty, and violence.⁷⁸ There are organizations like Transparency International that have started the Poverty and Corruption in Africa programs to root out corruption.⁷⁹ Similar efforts have been made by the United Nations, and the African Union has the Convention on Preventing and Combating Corruption. USAID has also demonstrated a focus on accountability and transparency along with the importance of democracy, human rights, and governance on development.⁸⁰ Central to these efforts are anti-corruption reforms.⁸¹ Within Sub-Saharan Africa almost all of the countries have signed onto the UNCAC and some countries have even enacted their own legislation.⁸²

There are many reasons for the prevalence of corruption in Africa but many of them can be traced back to the effects of colonization.⁸³ Though the focus of most anticorruption efforts has been on those who accept the bribes, the FCPA holds those paying the bribes responsible for the unlawful behavior.⁸⁴ One of the reasons for the creation of the FCPA was, “for American businesses to be seen by the rest of the world as fair, transparent and imbued with the ability to achieve their goals internationally on merit

⁷⁶ Hanson, *supra* note 66.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/whoweare> (last visited Jan. 25, 2014).

⁸⁰ USAID, *Promoting Accountability & Transparency*, <http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency> (last visited Jan. 25, 2014).

⁸¹ Convention on Preventing and Combating Corruption, July 11, 2003, 2nd Sess., Aft. Union, <http://www.africa-union.org/root/AU/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf> (last visited Jan. 25, 2014).

⁸² United Nations Convention Against Corruption, *supra* note 20.

⁸³ Igbunugo, *supra* note 75.

⁸⁴ *Id.*

rather than through corruption.”⁸⁵ Through passage of the FCPA the United States could call for other nations to put in place similar anti-bribery legislation as it has now claimed the moral high ground.⁸⁶

C. The Impact of United States v. Amaro Goncalvez, et al. on the Enforcement of the FCPA in Africa and Around the World

Although the number of corruption charges and fines collected by the U.S. government under the FCPA continues to rise, the DOJ has faced significant setbacks in FCPA trials, most recently in *United States v. Amaro Goncalvez et al.* (the “Africa Sting” case).⁸⁷

In January 2010, the DOJ announced that 22 executives and employees of companies in the military and law enforcement products industry were being charged for conspiring to bribe foreign government officials to obtain and retain business.⁸⁸ “Using large-scale undercover law enforcement techniques, the Africa Sting case was hailed as the largest single investigation and prosecution against individuals in DOJ’s history of enforcing FCPA.”⁸⁹ Assistant Attorney General Lanny A. Breuer called the investigation a “turning point” for the FCPA and thought that, “would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.”⁹⁰ The focus on individuals as well as companies as demonstrated by the Africa Sting case, demonstrates that the DOJ and SEC are concerned with stopping FCPA violations regardless of the form that the perpetrators take.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Press Release, U.S. Dep’t of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

⁸⁹ Igbanugo, *supra* note 75.

⁹⁰ See Press Release, U.S. Dep’t of Justice, *supra* note 88.

D. A Case Study of FCPA Violations in Nigeria

There have been a fair number of FCPA violations that have occurred in African countries over the years.⁹¹ The overwhelming majority of these incidences have occurred in Nigeria.⁹² Nigeria is a hot bed for corruption when it comes to violations of the FCPA. The British colonized Nigeria and they maintained control over Africa's most populous country through the 19th century.⁹³ Nigeria won its independence in 1960 after almost sixteen years of military rule and adopted a new constitution in 1999.⁹⁴ The government of Nigeria currently faces the daunting task of "reforming a petroleum-based economy whose revenues have been squandered through corruption."⁹⁵ Along with lingering problems from colonialism and corruption, Nigeria has a longstanding history of ethnic and religious tensions.⁹⁶ Though the most recent elections have been questioned due to significant irregularities and violence, Nigeria is in the middle of its longest period of civilian rule since independence.⁹⁷

In many Sub-Saharan African countries it is very difficult for U.S. companies to effectively operate and stay true to the FCPA when they frequently find themselves placed in situations where their integrity is tested with offers of significant bribes.⁹⁸

Listed below are three cases within just the last three years where FCPA investigations were carried out and violations discovered in Nigeria. In *SEC v. Parker Drilling Company*, Parker Drilling agreed to pay a \$11.76 million penalty after resolving FCPA investigations.⁹⁹ Marubeni Corporation agreed on January 17, 2012, to pay a \$54.6 million criminal

⁹¹ SEC: FCPA SPOTLIGHT, *supra* note 11.

⁹² *Id.*

⁹³ CENTRAL INTELLIGENT AGENCY, WORLD FACT BOOK, Africa: Nigeria, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Igbanugo, *supra* note 75.

⁹⁹ Press Release, U.S. Dep't of Justice, Parker Drilling Resolves FCPA Investigation and Agrees to Pay \$11.76 Million Penalty (Apr. 16, 2013), <http://www.justice.gov/opa/pr/parker-drilling-company-resolves-fcpa-investigation-and-agrees-pay-1176-million-penalty>.

penalty for FCPA violations in Nigeria.¹⁰⁰ JGC Corporation resolved the FCPA investigations against it and agreed on April 6, 2011 to pay a \$218.8 million criminal penalty for its violations in Nigeria.¹⁰¹

The DOJ's guide to the FCPA is helpful for U.S. companies carrying out business in Sub-Saharan Africa as it gives examples of what constitutes bribery and corruption.¹⁰² The guide even uses Nigeria as an example. The guide states,

The most obvious form of corrupt payment is large amounts of cash. In some instances, companies have maintained cash funds specifically earmarked for use as bribes. One U.S. issuer headquartered in Germany disbursed corrupt payments from a corporate "cash desk" and used offshore bank accounts to bribe government officials to win contracts.^[103] In another instance, a four-company joint venture used its agent to pay \$5 million in bribes to a Nigerian political party.^[104] The payments were made to the agent in suitcases of cash (typically in \$1 million installments), and, in one instance, the trunk of a car when the cash did not fit into a suitcase.^[105]

This is one of the clearest examples of corruption and an example for all U.S. businesses hoping to avoid FCPA violations.

Strict enforcement of the FCPA on U.S. companies will have a detrimental effect on American business if the United States is the only country dedicated to preventing corruption. No one wins when corruption and bribery are present in business. Corruption is detrimental to the host countries and hurts businesses that participate in that kind of unstable economic environment.¹⁰⁶ It is good that the international community is

¹⁰⁰ Press Release, U.S. Dep't of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), <http://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546>.

¹⁰¹ Press Release, U.S. Dep't of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), <http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188>.

¹⁰² *FCPA Resource Guide*, *supra* note 2, at 15.

¹⁰³ Complaint, SEC v. Daimler AG, No. 1-CV-00473 (D.D.C. Mar. 22, 2010), ECF No. 1, *available at* <https://www.sec.gov/litigation/complaints/2010/comp-pr2010-51.pdf>.

¹⁰⁴ Complaint, SEC v. Halliburton Company and KBR, Inc., No. 09-cv-399 (S.D. Tex. Feb. 11, 2009), ECF No. 1, *available at* <http://www.sec.gov/litigation/complaints/2009/comp20897.pdf>.

¹⁰⁵ *FCPA Resource Guide*, *supra* note 2, at 15.

¹⁰⁶ Igbunugo, *supra* note 75.

taking steps through the creation of their own acts including the UK Bribery Act.¹⁰⁷

IV. SUCCESS OF THE FCPA IN THE DIMINUTION OF CORRUPTION THROUGHOUT THE WORLD

In the fight against corruption on a global scale, having the United States as a leader cannot be downplayed. The FCPA is a serious statement by the United States of its continued resolve to eradicate corruption. Though it is often argued that the FCPA hurts the competitiveness of American companies against foreign competitors that are not bound by the FCPA, this figure has been found to be inconsequential.¹⁰⁸ Corruption has by no means been eradicated and the increase in number of incidences and fines assessed seems to indicate that corruption is growing rather than shrinking, but the United States' continued focus on corruption through the FCPA will only help to diminish corruption worldwide.

V. CONCLUSION

The United States' commitment to the eradication of corruption through stricter enforcement of the FCPA is not only in the best interest of the United States but also in the interest of many African nations. With greater transparency in business and the knowledge that the FCPA violators will be discovered and harshly penalized, companies should be motivated to act within the limits of the FCPA. It is through efforts like the FCPA that the United States can have a positive impact on African countries that have struggled to develop while corruption remains unchecked.

¹⁰⁷ UK BRIBERY ACT 2010 (2011).

¹⁰⁸ John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. INT. BUS. STUD. 107 (1984).